84-23

No.

In The Supreme Court of the United States

October Term, 1984

ANTHONY PETRALIA,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS AND APPELLATE DIVISION OF THE STATE OF NEW YORK

LESLIE NIZIN
STURIM AND NIZIN
Attorneys for Petitioner
125-10 Queens Boulevard
Kew Gardens, N.Y. 11415
(212) 263-2411

Dick Bailey Printers, 203 Richmond Avenue ■ Staten Island, New York 10302
Tel.: (212) 447-5358 — (516) 222-2470 — (914) 682-0848

30 pp

QUESTION PRESENTED

Where an accused challenges a warrantless search and seizure by one police officer based upon accusations received from another police source, must the people demonstrate that the sender or sending agency itself possessed the requisite probable cause to act. Must the people call the accusing police officer to testify in such a proceeding.

TABLE OF CONTENTS

TABLE OF CASES

In The
SUPREME COURT OF THE UNITED STATES
October Term 1984

ANTHONY PETRALIA,

Petitioner,

-against-

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS AND APPELLATE DIVISION OF THE STATE OF NEW YORK

To: The Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States.

Anthony Petralia, the Petitioner herein, respectfully prays that a writ of certiorari issue to review the order of the Court of Appeals, of the State of New York, entered on May 8, 1984, reversing the opinion of the Appellate Division of the Supreme Court, and the judgments and orders of the Appellate Division of the State of New York entered on April 11, 1983, affirming the judgment of the Supreme Court of the State of New York, entered on December 3, 1981, suppressing the physical evidence seized from the petitioner, and the vehicle in which the petitioner was the driver.

OPINIONS BELOW

The Court of Appeals of the State of New York reversed the decision of the Appellate Division of the Supreme Court of the State of New York, which decision is attached hereto as Appendix A.

The judgment of the Appellate Division of the Supreme Court of the State of New York was rendered in an opinion officially reported as *People v. Petralia*, 93 AD2d 842, 2nd Dept. 1984 and is annexed as Appendix B.

The judgment of the Appellate Division of the Supreme Court of the State of New York affirmed an opinion of the Trial Court of the Supreme Court of the State of New York, annexed as Appendix C.

The order of the Court of Appeals of the State of New York was entered on May 8, 1984, the order of the Appellate Division of the State of New York was entered on April 11, 1983.

JURISDICTION

The jurisdiction of this Court is involved under 28 U.S.C. Section 1257(3).

STATEMENT

Petitioner, Anthony Petralia, was indicted in the Supreme Court of the State of New York, for the crimes of Criminal Sale of a dangerous drug in the first degree, and Criminal Possession of a dangerous drug in the first degree.

Petitioner, moved by way of notice of motion to suppress the physical evidence seized from the petitioner, and from petitioner's car at the time of his arrest. The basis of petitioner's application was that the police officer who arrested the petitioner did so without probable cause.

A hearing was conducted on petitioner's motion, and the sole witness called by the respondent was a

detective who arrested the petitioner based upon a radio communication he had received from another police officer, who was part of a "buy and bust" operation. Concededly, the arresting officer had no independent information of his own as to petitioner, nor had he observed the petitioner commit any criminal acts. At the time of the hearing the arresting officer had destroyed his notes of the radio report he had received, and testified from the undercover police officer's report. The undercover police officer was not called to testify by the respondent.

The petitioner's motion was granted in a decision rendered in the Supreme Court of the State of New York and designated Appendix A.

The Appellate Division of the Supreme Court of the State of New York affirmed the opinion of the trial court below. See Appendix B.

The respondents appealed to the Court of Appeals of the State of New York. The Court of Appeals reversed the decision of the Appellate Division and remitted the case to the Supreme Court of the State of New York. See Appendix C.

REASONS FOR GRANTING THE WRIT

The writ should issue because the State of New York deprived the petitioner in a criminal proceeding of his Fourth, Fifth, and Fourteenth Amendment rights to a fair hearing and to due process of law, freedom from arbitrary and unreasonable police search and seizure, effective assistance of counsel, compulsory process and from his right of confirmation of witnesses.

The Fourth Amendment's prohibition of the Federal Government from convicting a person of a crime by the use of testimony obtained through an unreasonable and unlawful search and seizure, is enforceable against the State, through the Fourteenth Amendment. The same sanctions and exclusions apply in the State Courts that apply in the Federal Courts. *Kerr v. State of California*, 374 U.S. 23.

The Fourth Amendment's guarantee against unreasonable governmental action may not be circumvented by the respondent indicating that the information was received by the arresting officer from another police officer. *Whiteley v. Warden*, 401 U.S. 560. The respondent must produce the sending officer to sustain their burden that the police actions of arrest was based upon information that was reliable, and true to the level of probable cause. There was no claim as to the officer who relayed the information being unavailable.

Thus, the lawfulness of petitioners warrantless arrest, and search of his person, and trunk of his car, depends upon an officer not present, to confront his accuser. The decision of one police officer that there was probable cause to arrest is effectively sealed from the respondent's constitutional challenge. Such is in violation of petitioner's constitutional rights, as an otherwise illegal arrest cannot be insulated from challenge by the decision of the investigating officer to rely solely on fellow officer to make the arrest.

> "(W)here the accuser is himself a police officer the truthfulness of his accusations implicate the Fourth Amendment for, if he has lied, the defendant has been victimized by improper governmental conduct . . . and

this regardless of the good faith of the arresting officer. As the Supreme Court has said "an otherwise illegal arrest cannot be insulated from challenge by the decision of the investigating officer to rely on fellow officers to make an arrest." *Whitely v. Warden*, 401 U.S. 560 at 568.

The purpose of the Fourth Amendment is the protection of innocent and guilty alike, from search or arrest based upon mere suspicion or surmise, rather than upon proof of believing a crime to have been committed.

The arresting officer was entitled to act upon information received over a police radio. However, once a challenge is made to the officers actions the presumption of probable cause disipates. The respondent is then called upon to establish that there was probable cause for the warrantless arrest. *United States ex rel. Mungo v. LaVallee*, 522 F. 2d 211.

Should his accuser be in error, irrespective of good faith, there has been an improper governmental conduct perpetrated upon the accused, regardless of the good faith of the arresting officer.

This Court in *Trupriano v. United States*, 68 Sup. Ct. 1229, held that:

"The Fourth Amendment was designed to protect both the innocent and the guilty from unreasonable intrusions upon their right of privacy while leaving adequate room for the necessary process of law enforcement. The People of the United States insisted on writing the Fourth Amendment into the Constitution because bad experience had taught them that the right to search and seizure should not be left to mere discretion of the police. . . ."

See also Mr. Justice Douglas' dissent in *Draper v. United States,* 358 U.S. 307.

In Kerr v. California, 374 U.S. 23, 32-33, this court stated:

> "Implicit in the Fourth Amendment's protection from unreasonable searches and seizures is its recognition of individual freedom. That safeguard has been declared to be "as of the very essence of constitutional liberty" the guaranty of which is as important and as imperative as are the guarantees of the other fundamental rights of the individual citizen. . . ." *Gouled v. United States,* 255 U.S. 298, 304 (1921); cf. *Powell v. Alabama,* 287 U.S. 45, 65-68 (1932). While the language of the Amendment is "general" it "forbids every search that is unreasonable; it protects all, those suspected or known to be offenders as well as the innocent, and unquestionably extends to the premises where the search was made . . ."
>
> *Go-Bart Importing Co. v. United States,* 282 U.S. 344, 357 (1931). Mr. Justice Butler there stated for the Court that "(t)he Amendment is to be liberally construed and all owe the duty of vigilance for its effective enforcement lest there shall be impairment of the rights for the protection of which it was adopted." Ibid.

This doctrine of liberal construction was reaffirmed in *Coolidge v. New Hampshire* (403 U.S. 433-454), where, Mr. Justice Stewart, speaking for the court, reaffirmed Mr. Justice Bradley's admonition in *Boyd v. United States,* (116 U.S. 616, 635) as follows:

> "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that

way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. All close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."

Justice Stewart went on to say (pp. 454-455):

"Thus the most basic constitutional rule in this area is that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.' The exceptions are 'jealously and carefully drawn,' and there must be 'a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative.'

"(T)he burden is on those seeking the exemption to show the need for it.' "

CONCLUSION

For the above stated reasons, a writ of certiorari should issue to review the orders and judgments of the Court of Appeals of the State of New York and of the Appellate Division of the Supreme Court of the State of New York.

Respectfully submitted,

LESLIE NIZIN
STURIM AND NIZIN
Attorneys for Petitioner
125-10 Queens Boulevard
Kew Gardens, N.Y. 11415
(212) 263-2411

APPENDIX A—JUDGMENT AND OPINION OF THE SUPREME COURT OF THE STATE OF NEW YORK

SUPREME COURT, QUEENS COUNTY
CRIMINAL TERM, PART L-2

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

ANTHONY PETRALIA,

Defendant.

BY EIBER, J.
DATED DECEMBER 3, 1981
Ind. No. 8078/81

The defendant, having sought and been granted leave to reargue his motion to suppress physical evidence previously denied, addresses the following issues:

> "I. The People failed to establish probable cause at the suppression hearing when the only witness was the arresting officer who had not personally observed the alleged sale of heroin to an undercover officer."
>
> "II. The People are not entitled to a rehearing to establish the requisite probable cause; the physical evidence must be suppressed."

This Court, after extensive research relevant to the fact pattern of cases cited by counsel, concurs

with counsel's argument and reverses previously entered (July 22, 1981) denial of defendant's motion and grants suppression. The above referred to decision was rendered prior to the availability to this Court of the underlying facts behind the decision of *People v. Delgado,* 79 App. Div. 2nd, 976, and *People v. Petro,* __ App. Div. 2nd, __ Decided 7/6/81, which affirmed the precepts enunciated in *Delgado* and upon which this Court now relies.

The Appellate Division determined, on facts similar to those existing at bar that it is incumbent upon the People to produce, at the suppression hearing, an undercover officer who relays information to the receiving arresting officer where such information served as the predicate for probable cause.

Additionally, the Delgado Court found ". . . where the undercover officer was available to testify at the hearing, but the People chose only to offer the testimony of the arresting officer, the People are not entitled to a rehearing on the issue of probable cause (see *People v. Havelka,* 45 NY 2d 636, 644)."

In *Draper v. United States* (358 US 307) and *Aguila v. Texas,* (378 US 108) which expanded upon *Draper,* the United States Supreme Court established that the informant's reliability and basis for knowledge must be tested when determining whether hearsay is to be received to meet the requirements of probable cause. In *People v. Elwell* (50 NY 2nd 230), Judge Meyer, in writing for the N.Y. Court of Appeals, established the more stringent test for admissibility of informant information by stating the rule as follows: ". . . a warrantless search or arrest will be sustained only when the police observed conduct

suggestive of, or directly involving, the criminal activity about which an informant who did not indicate the basis for his knowledge has given information to the police or when the information furnished about the criminal activity is so detailed as to make clear that it must have been based on personal observations of that activity." It appears to this Court that despite the stringent standards in *Elwell*, the Appellate Division in *Delgado* and *Presto* now imposes in a motion to suppress proceeding the additional burden of establishing the proof of probable cause to the level of proof beyond a reasonable doubt where not even proof of a prime facia case is required (*Adams v. Williams*, 407 US 143, 149; *People v. Miner*, 42 NY 2nd 937; *People v. Rivera*, 67 App. Div. 2nd 86; *People v. Cambridge*, rptd N.Y.L.J. 11/24/80, App. Div. 1st Dept). This higher level is sought to be accomplished by demanding the testimony of an undercover officer at the suppression hearing even though the undercover has related specific verifiable information of criminal activity (which in his capacity as an undercover was an active party to the transaction) to the arresting officer. This tampering and thereby diminishing the accepted concept of what is known to one police officer is imputed to the whole police organization (*United States v. Delporte*, 357 F Supp 969; *United States v. Woods*, 544 F 2nd 242; *LaFave, Search and Seizure*, Capt. 5) and/or there is no impediment in the proof arising out of the arresting officer's acting on information or instructions from his fellow officer, "provided that the police as a whole were in possession of information sufficient to constitute probable cause to make the arrest." (*People v. Horowitz*, 21 NY 55, 60). In noting this divergence, the Court would also point out the discrepancy with the Appellate Division's earlier finding in *People v. Sanders* (rptd N.Y.L.J.

12/24/80, p. 13) wherein the 2nd Department found "in New York, hearsay is admissible at a pretrial hearing to prove a material fact (See CPL 710.60, subd 4) *** testimony as to an accusation made to him is not truly hearsay."

This Court although constrained to follow the Appellate Division decisions finds difficulty in reconciling their *Delgado* (supra) and *Presto* (supra) findings with the leading cases of the United States Supreme Court and the New York Court of Appeals hereinabove cited pertaining to the testing prongs, i.e. basis of knowledge and reliability of informants is in effect making a chilling attack on a police officer's credibility when transmitting a criminal activity while performing his duties during an elaborate police detail.

Accordingly, and for the above stated reasons, this Court recalls and vacates its previously entered order of July 22, 1981, and grants suppression of seized physical evidence.

Order entered accordingly.

The clerk of the court is directed to mail a copy of this decision and the order to be entered thereon to the attorney for the defendant.

s/ Geraldine T. Eiber
Geraldine T. Eiber
J.S.C.

APPENDIX B—JUDGMENT AND OPINIONS OF THE APPELLATE DIVISION OF THE STATE OF NEW YORK

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on April 11, 1983

HON. DAVID T. GIBBONS, Justice Presiding,
HON. WILLIAM C. THOMPSON,
HON. LAWRENCE J. BRACKEN,
HON. JAMES F. NIEHOFF. *Associate Justices*

The People, etc.,

Appellant,

v.

Anthony Petralia,

Respondent.

Order on Appeal from Order

In the above entitled cause, the above named The People, etc., plaintiff, having appealed to this court from an order of the Supreme Court, Queens County, dated December 3, 1981, which, after a hearing, granted defendant's motion to suppress physical evidence; and the said appeal having been submitted by Michael J. Connolly, Esq., of counsel for the appellant, and submitted by Barry S. Stendig, Esq., of counsel for the respondent, and due deliberation having been had thereon; and upon this court's opinion

and decision slip heretofore filed and made a part hereof, it is:

ORDERED that the order appealed from is hereby unanimously affirmed.

Enter:

IRVING N. SELKIN
Clerk of the Appellate Division

APPENDIX C—JUDGMENT AND OPINION OF THE COURT OF APPEALS OF THE STATE OF NEW YORK

STATE OF NEW YORK
COURT OF APPEALS

---

2 No. 365
The People &c.,

Appellant,

v.

Anthony Petralia,

Respondent.

OPINION

This opinion is uncorrected and subject to revision before publication in the New York Reports.

(365) John J. Santucci, DA, Queens County (Catherine Lomuscio of counsel) for appellant

David Samel & William E. Hellerstein, NY Legal Aid, for respondent Petralia.

WACHTLER, J.

The defendant has moved to suppress evidence seized at the time of his arrest for allegedly selling drugs to an undercover police officer who had informed the arresting officer of the sale. After a hearing, at which only the arresting officer testified, the trial court suppressed the evidence on constraint of certain

Appellate Divisin decisions which hold the testimony of the undercover officer essential to establish probable cause under these circumstances. The Appellate Division affirmed, and the People have appealed. The issue is whether the People failed, as a matter of law, to meet their initial burden of showing probable cause for the arrest when they produced the arresting officer who testified that he relied on information from an undercover police officer who reported that he had just purchased drugs from the defendant.

The incident occurred in Queens County on March 1, 1981, and involves a team of New York City police officers specially trained in narcotics. On that date, the team was engaged in a "buy and bust" operation in which an undercover officer buys drugs from street dealers while "back up" officers follow the sellers and arrest them some distance away, after the undercover officer informs them that a sale has been completed and describes or identifies the seller. At approximately 4:30 p.m. that day, one of the back up officers, Detective McCarthy, was contacted on a police radio by the undercover officer who stated that he had just purchased heroin from "a male white, approximately 25, six feet, 150 pounds" wearing a blue jacket and black pants. The undercover officer also informed Detective McCarthy that the seller had entered a black Ford bearing a certain license plate and stated the "stash was in the trunk."

Detective McCarthy followed the vehicle for approximately six blocks. When the defendant stopped his vehicle, the officer placed him under arrest and searched him and the trunk of the car. In one of the defendant's pants pockets the officer found four $5.00 bills and one $10.00 bill which he identified as

"previously reported buy money." From the trunk of the car the officer recovered a bundle of glassine envelopes containing white powder which proved to be heroin under laboratory analysis. The defendant was indicted for criminal possession and sale of a controlled substance. He moved to suppress the evidence seized at the time of his arrest.

At the hearing the only witness called by the People was the arresting officer, Detective McCarthy, who related the above events and identified the undercover officer by shield number. The defendant did not call any witnesses. The court originally denied the motion to suppress. However, on reargument the court granted the motion and suppressed the evidence on constraint of certain recently decided cases from the Appellate Division, Second Department, because the People had not called the undercover police officer to testify at the hearing. The court noted that "although constrained to follow the Appellate Division decisions" it found difficulty in reconciling the rule with other decisions from this court, and the United States Supreme Court, and observed that the rule would have a "chilling" effect on undercover police activities.

The Appellate Division affirmed in a brief memorandum stating: "The People concede that affirmance is mandated by this court's prior decisions in *People v. Delgado* (79 AD2d 976) and *People v. Petro* (83 AD2d 566, app dsmd 56 NY2d 782), but urge that this court overrule those decisions. The holding in those cases followed the reasoning set forth by the Court of Appeals in *People v. Havelka* (45 NY2d 636) and *People v. Lypka* (36 NY2d 210), and has been followed by subsequent decisions of this court, (see

e.g., *People v. Calderon*, 88 AD2d 604, *People v. Green*, 87 AD2d 892)."

The facts in the cases from this court cited by the Appellate Division *(People v. Havelka*, 45 NY2d 636; *People v. Lypka*, 36 NY2d 210) are substantially different from the facts of this case. It is true that in each of those cases the arresting officer relied on information from another officer, and we held that the testimony of the sending officer was necessary to establish probable cause. However, the key factor in those cases is that the record did not indicate how the sending officer had acquired his information. In neither case did the record show that the sending officer had personal knowledge of the facts he transmitted and, indeed, in *Havelka* he had relied on a source or series of sources of unknown reliability.

The reason for the rule first announced in *Lypka* is illustrated by the Supreme Court decision in *Whiteley v. Warden* (401 US 560) which was cited in *Lypka*. In *Whiteley* the arresting officer had relied on a radio bulletin that there was a warrant for the defendant's arrest. The warrant had been obtained by another officer who had relied, in turn, on an "unnamed informant," but did not provide sufficient facts in the warrant application to "support either the reliability of the informant or the informant's conclusion that these men were connected with the crime" (*Whiteley v. Warden, supra*, 567). The court noted (at p. 568) that the arresting officers "were entitled to act on the strength of the radio bulletin. Certainly police officers called upon to aid other officers in executing arrest warrants are entitled to assume that the officers requesting aid offered the magistrate the information requisite to support an independent judicial

assessment of probable cause. Where, however, the contrary turns out to be true, an otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest." Thus, in that case, the police had acted as a conduit for an unknown source whose information did not facially constitute probable cause and could not be said to improve in quality merely because it had been relayed from one officer to another.

In the case now before us, the arrest was not based on information from an unknown source of unknown reliability. The evidence submitted to the court by the arresting officer shows that he relied on information from another officer on the narcotics team who had personally witnessed the defendant commit the crime just prior to the radio transmission. This testimony by one of the officers involved in the operation would, if credited, establish probable cause for the arrest and there was no need for the People to also produce the undercover officer to support a finding of probable cause by the court. As the Supreme Court noted in *United States v. Ventresca*, (380 US 102, 111): "Observations of fellow officers of the Government engaged in a common investigation are plainly a reliable basis for a warrant applied for by one of their number." Although that case dealt with a warrant, the same type of analysis is required when a court is called upon at a suppression hearing to determine whether the People have met their burden of coming forward with evidence establishing probable cause for an arrest (*People v. Dodt*, __NY2d__ [case #123, slip opn p. 6]; *People v. Bouton*, 50 NY2d 130,

135).*

There may be cases in which the evidence presented at the hearing raises substantial issues relating to the validity of the arrest, the resolution of which could be aided by requiring the People to produce the undercover officer or by making him available to the defendant. But a *per se* rule requiring that he appear in every instance, as the defendant urges here, is unwarranted and could jeopardize the officer or his usefulness in pending or future investigations. Of course, the undercover officer may have to appear at a trial, if there is one, but there is no need for the People to produce all of their witnesses at a hearing where they only bear the burden of coming forward with evidence showing that there was probable cause for the arrest, and are not obligated to establish guilt beyond a reasonable doubt.

Contrary to the dissent's contention, our rejection of the per se rule does not mean that the "decision of the police that there was probable cause to arrest and search defendant is thus effectively insulated from challenge by defendant." The defendant is always free

* Several statements made by the dissent must be disclaimed in order to avoid confusion in future cases. First, we are not equating an undercover police officer with a private informant," in terms of veracity, reliability and basis of knowledge." It should be evident that we have taken the contrary position that a police officer working undercover is still a police officer and should *not* be equated with a mere private or civilian informant for the purposes of assessing the reliability of the information he provides. Secondly, the undercover officer's report, which was included at the hearing in this case, was offered by the defendant in an effort to show that there was no basis, independent of the arrest, for searching the trunk of the car; it was not offered to challenge the legality of the arrest itself and therefore has no bearing on that issue.

to cross examine the arresting officer and any other witnesses produced by the prosecution and may, of course, call his own witnesses or testify on his own behalf with respect to his conduct prior to the arrest. This testimony may disclose to the court that probable cause was lacking, in which case the evidence will be suppressed, or may, as noted, present substantial questions concerning the legality of the police conduct in making the arrest which may only be resolved by producing the undercover police officer or making him available to the defendant. Absent such a showing, however, requiring the People to produce the undercover officer is gratuitous and can only serve to expose or compromise the undercover officer, disrupt pending investigations in which he may be involved, or provide the defendant with a means of pressuring the People into accepting a "better" plea in order to avoid these consequences. Thus the flexible rule we have adopted should reasonably accommodate the legitimate interests of the defendant without rendering impractical the "buy and bust" operations which have become an important, if not indispensable, part of police efforts to curtail illegal drug activity.

Accordingly the order of the Appellate Division should be reversed, the motion to suppress denied, and the case remitted to the Supreme Court, Queens County, for further proceedings on the indictment.

People v. Petralia

Kaye, J. (Dissenting)

Where, as here, an accused challenges a warrantless search and seizure conducted by one police officer based upon accusations received from another

police source, "to sustain their burden at the suppression hearing, the People must demonstrate that the sender or sending agency itself possessed the requisite probable cause to act." (*People v. Lypka*, 36 NY2d 210, 214; *People v. Havelka*, 45 NY2d 636). In now holding that the People have met their burden without producing the accusing officer to testify as to the basis for his accusation, the majority reasons that the seemingly clear command of *Lypka* and *Havelka* is inapplicable because "the key factor in those cases is that the record did not indicate how the sending officer had acquired his information" whereas here the arresting officer's testimony purportedly showed that the accusing officer "had personally witnessed the defendant commit a crime."

While the majority would examine the sending officer's accusations in terms of veracity, reliability and basis of knowledge, as if information had been received from a private informant (see *People v. Elwell*, 50 NY2d 231), the rule in *Lypka* and *Havelka* does not rest on concern for the veracity, reliability or knowledgability of police officers as informants.[1] The rule is based upon entirely different considerations, namely the right of an accused under the Fourth Amendment of the United States Constitution and Article I, section 12 of the New York Constitution to put government accusers—as opposed to private accusers—to their proof onthe issue of probable cause to arrest or to search. Because the result today

1. Indeed, in *Lypka*, this Court observed that the police bulletin which instigated the search and seizure was "far more relieable than the usual sort of hearsay upon which warrants may issue." Nonetheless, the communication would not suffice for probable cause.

disregards this fundamental distinction and represents an unwarranted departure from our prior decisions, I respectfully dissent.

The only basis in the record for the majority's conclusion that the undercover officer personally observed defendant commit a crime is the testimony of the arresting officer that the undercover officer told him the defendant committed a crime. The arresting officer, while technically subject to cross-examination by defendant, was without personal knowledge of the relevant facts. He admitted that he did not personally observe any sale of drugs or "stash" in the trunk of defendant's automobile, and received no information other than the cursory accusatory radio communication from the undercover officer, who, the arresting officer testified, "didn't tell me anything about his observations." Although there was no claim that he was unavailable, the undercover officer, on whose accusations the lawfulness of defendant's warrantless arrest and the search of his person, as well as the warrantless search of the trunk of defendant's automobile, must depend, was not produced and did not testify. The People produced no other witness at the hearing.[2] When defense counsel attempted to introduce the undercover officer's report, both as to the "buy" and as to the search, the People objected on the ground that it could not be used to impeach because "[t]his is written as to what someone else saw and heard," and the court sustained this objection. The decision of the police that there was probable cause to

2. Where, as here, the testifying officer lacks personal knowledge, no other witness is produced, and the defendant is arrested alone, it is hard to imagine the sort of "showing" the majority contemplates in order to require production of the undercover officer, or where there is flexibility in its rule.

arrest and search defendant and also to search the trunk of defendant's automobile is thus effectively insulated from challenge by defendant.

Such insulation of the government's decision to arrest and search is prohibited by the federal and state constitutions. Unlike those of a private informant, the accusations of a government officer are subject to constitutional proscriptions (*People v. Gleeson*, 36 NY2d 462, 465) and "an otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest." (*Whitely v. Warden*, 401 US 560, 568). Where the accuser is a police officer, and not a private informant, the soundness of his accusation implicates the accused's constitutional rights, for if the accuser is in error, the accused has been the subject of improper governmental conduct, regardless of the good faith of the arresting officer. (*People v. Ward*, 95 AD2d 233, 239). If in a particular case it is necessary to preserve the anonymity of an undercover officer—a claim which was not in any event made by the People in the present case—then measures can be taken to conceal the officer's identity while testifying, without loss of an accused's constitutional rights.

Clearly, it is incumbent upon the People in the first instance to show the existence of probable cause to arrest the defendant and to search his automobile. (*People v. Bouton*, 50 NY2d 130, 136). The end result of today's decision is that the People can fulfill that burden at a suppression hearing by producing an officer who has no knowledge of and cannot be impeached or even examined concerning the basis for probable cause, but who will testify only that he was told by

another officer that the defendant committed a crime and that there is contraband in defendant's automobile. This new *per se* rule ignores basic constitutional safeguards.

* * *

Order reversed, motion to suppress denied, and case remitted to Supreme Court, Queens County, for further proceedings on the indictment. Opinion by Judge Wachtler in which Judges Jasen, Jones, Meyer and Simons concur. Judge Kaye dissents and votes to affirm in an opinion in which Chief Judge Cooke concurs.

Decided May 8, 1984